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No. 92-784

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

OKLAHOMA COALITION TO RESTRICT ABORTION, INC. and FRED W. SELLERS, JR.,

Petitioners,

—v.—

NANCY FELDMAN, KIM LITTLE, JANET M. TALIAFERRO, PAM FLEISCHAKER and ANDREW TEVINGTON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE OKLAHOMA SUPREME COURT

BRIEF OF RESPONDENTS TALIAFERRO, FLEISCHAKER AND TEVINGTON IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment precludes the Oklahoma Supreme Court, pursuant to art. II, § 1 of the Oklahoma Constitution, from removing a concededly unconstitutional initiative from the ballot prior to a public vote?

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Respondents Janet Taliaferro, Pam Fleischaker and Andrew Tevington oppose the Petition for a Writ of Certiorari filed on October 29, 1992 by the Oklahoma Coalition to Restrict Abortion and Fred Sellers, Jr. The Petition seeks review of a decision of the Oklahoma Supreme Court that ordered the removal from the ballot of an abortion initiative because it was unconstitutional under this Court's decision in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). The opinion of the Oklahoma Supreme Court, issued August 4, 1992, is reported at 838 P.2d 1 (Okla. 1992).

COUNTERSTATEMENT OF THE CASE

Initiative petition No. 349 (hereinafter "the abortion initiative") would impose a criminal ban on virtually all abortions in Oklahoma.[1] On July 14, 1992, following this Court's opinion in *Planned Parenthood v. Casey*, which found that a state law banning abortion violates a woman's federal constitutional right of privacy, *see id.*, 112 S. Ct. at

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[1] The measure criminalizes all abortions except in certain narrow circumstances: (1) where "necessary to save the life of the female or to avoid a grave impairment of the female's physical or mental health," 113a; (2) in cases of rape reported within 30 days of the incident or incest reported prior to the abortion, 114a-15a; or (3) in cases where the "unborn child would be born with a grave physical or mental defect." 114a. In cases falling under (1) and (3), the qualifying condition must be certified by a physician who "may not perform or assist in the performance of the abortion, and shall not have any pecuniary interest, either direct or indirect, in the performance of the abortion." 114a-115a. All persons performing or intentionally or knowingly aiding in the performance of abortions not falling within these narrow exceptions are to be punished by a minimum of four years imprisonment and clinics are to be punished by a fine ranging from $10,000 to $100,000. 113a. The measure would take effect immediately on passage, 117a, eliminating any opportunity for the orderly determination of its constitutionality before it is enforced.

2804, the Oklahoma Supreme Court, *sua sponte*, ordered all parties to brief the constitutionality of the abortion initiative under *Casey*.[2] On August 4, 1992, pursuant to art. II, § 1 of the Oklahoma Constitution, which prohibits initiatives that are "repugnant to the United States Constitution," the Oklahoma Supreme Court removed the abortion ban from the ballot. In response, petitioners filed their Petition for a Writ of Certiorari with this Court.

REASONS FOR DENYING THE WRIT

Although they fully concede that the proposed ballot measure is unconstitutional under this Court's decision in *Casey*,[3] petitioners nevertheless insist that they have a First Amendment right to force Oklahoma to hold a straw poll on the abortion ban. This claim is groundless and without merit. Just last Term, this Court held that there is no First Amendment right to use the election process as a forum for political expression. *Burdick v. Takushi*, 112 S. Ct. 2059

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[2] In addition to proponents and protestants, the Oklahoma Supreme Court invited the Attorney General of Oklahoma to participate in the case. After petitioners' motion to disqualify the Attorney General, *see* Pet. at 7 n.2, was denied, the Attorney General submitted a brief supporting the removal of the initiative from the ballot. Petitioners' attack on the denial of their motion, *see id.* ("the Attorney General's role . . . is limited to determining whether the proposed ballot title is in legal form and in harmony with the law") is improper. No citation is needed for the proposition that a state supreme court may solicit briefs from any source it believes will assist its decision. Respondents Taliaferro, Fleischaker and Tevington support the granting of the Attorney General's Motion to Intervene and concur in the argument set forth in her Brief in Opposition filed with this Court.

[3] Pet. at 26; *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3399 (U.S. Nov. 30, 1992) (No. 92-104); *Sojourner T v. Edwards*, 974 F.2d 27 (5th Cir. 1992).

(1992). In addition, federal courts of appeals are unanimous in affording state courts broad discretion to remove unconstitutional initiatives from the ballot. *Gibson v. Firestone*, 741 F.2d 1268 (11th Cir. 1984), *cert. denied*, 469 U.S. 1229 (1985); *Henry v. Connolly*, 910 F.2d 1000 (1st Cir. 1990). Oklahoma's procedure allowing judicial review of proposed initiatives prior to a vote is precisely the type of matter that belongs within the sound discretion of a state court and which this Court should neither disturb nor review.

Moreover, if accepted, petitioners' argument would condemn as a violation of the First Amendment any court ruling or administrative action invalidating an initiative petition and would thereby undermine the central role of the judiciary as the ultimate arbiter of the constitutionality of legislation, a matter of settled law since this Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

Petitioners have shown no conflict between the decision of the Oklahoma Supreme Court and that of either any other state court of last resort or United States Court of Appeals, *see* Sup. Ct. R. 10.1(b); nor have they shown that the court below decided an issue of law that "has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). Thus, all the Rule 10 factors that this Court considers in deciding whether to grant review weigh heavily against granting the writ.

I. REFUSING TO PLACE AN UNCONSTITUTIONAL INITIATIVE ON THE BALLOT DOES NOT ABRIDGE PETITIONERS' FIRST AMENDMENT RIGHT TO ENGAGE IN POLITICAL SPEECH.

Without authority, petitioners make the specious claim that art. II, § 1 of the Oklahoma Constitution, which authorizes state courts to remove from the ballot those initiative measures that are "repugnant to the federal constitution,"[4] violates their First Amendment right to express their opinion through voting. But in *Burdick v. Takushi*, 112 S. Ct. 2059 (1992), this court recently rejected a challenge to Hawaii's ban on write-in ballots, holding that the ban did not "discriminate[] against [the voter] based on the content of the message he seeks to convey through his vote." *Id.* at 2065. The Court held that "[a]ttributing to elections a . . . generalized expressive function would undermine the ability of States to operate elections fairly and efficiently," *id.* at 2066, and that nothing in the First Amendment requires that "the State record, count and publish individual protests against the election system . . . ." *Id.* at 2067; *see also id.* at 2069 (Kennedy, J., dissenting) ("[T]he purpose of casting, counting and recording votes is to elect public officials, not to serve as a general forum for political expression"). Like the prohibition on write-in votes upheld in *Burdick*, Oklahoma's constitutional provision restricting ballot access

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[4] This provision of the Oklahoma Constitution has been interpreted "in an unbroken chain of decisional law" to require "a determination on a constitutional question as to the legality of a measure proposed to be enacted into law by the people" if reaching the issue may prevent the holding of a costly and unnecessary election. 10a. Petitioners' attack on this interpretation, *see* Pet. at 13, is beyond the jurisdiction of this Court because it is wholly a question of state law. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1041-42 (1983).

to constitutional measures falls within the category of "reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." *Id.* at 2066. Thus, far from being at odds with a decision of this Court, the decision of the Oklahoma Supreme Court is completely consistent with this Court's decision in *Burdick*.

Meyer v. Grant, 486 U.S. 414 (1988), upon which petitioners' entire argument depends, is not to the contrary. Nothing in *Meyer* supports the view that there is a First Amendment right to cast a ballot on an initiative that fails to meet a state's legal requirements for placement on the ballot. Rather, *Meyer* holds that state procedures for persuading voters to support an initiative petition may not impose burdensome restrictions on the advocacy of the initiative. It is undisputed that if Oklahoma had sought to restrict discussion of the initiative by penalizing speech about the abortion ban, it too would have overstepped constitutional bounds. But here, the Oklahoma Supreme Court has not restricted or prohibited any discussion about the unconstitutional measure; it has simply refused to place it on the ballot for a vote. Prohibiting the *enactment* of unconstitutional legislation is not the same as prohibiting the *advocacy* of unconstitutional legislation. Petitioners are no more entitled to have Oklahoma conduct a vote on their proposal as a vehicle for expression about the abortion issue than any other Oklahoman is entitled to use the voting booth as a soapbox for the advancement of his or her own agenda. As this Court held in *Burdick*, elections do not have a "generalized expressive function." 112 S. Ct. at 2066.

The United States Courts of Appeals are unanimous in according broad deference to state courts to remove initiative measures from the ballot prior to a vote. In *Gibson v. Firestone*, 741 F.2d 1268 (11th Cir. 1984), *cert.*

denied, 469 U.S. 1229 (1985), the Court of Appeals for the Eleventh Circuit refused to recertify a ballot measure that the Florida Supreme Court had removed from the ballot on constitutional grounds. *See Fine v. Firestone*, 448 So. 2d 984 (Fla. 1984). In words that apply directly to this case, the *Gibson* court held:

> Clearly, appellants can claim no constitutionally-protected right to place issues before the Florida electorate; any opportunity to do so must be subject to compliance with state constitutional requirements.

741 F.2d at 1273 (footnote omitted). Similarly, in *Henry v. Connolly*, 910 F.2d 1000 (1st Cir. 1990), the Court of Appeals for the First Circuit refused to place an initiative on the ballot after it had been removed by the Massachusetts Supreme Judicial Court on state constitutional grounds. In keeping with *Meyer*, the court recognized that a state must "administer ballot access . . . in a manner comporting with the demands of the federal Constitution." *Henry*, 910 F.2d at 1004. The court added:

> Nevertheless, it is important to remember that the federal nose cannot be poked into the state's tent unless some constitutional infirmity exists. So long as the constitutional minimum is met, our task ends. It is not for a federal court to say that a constitutionally adequate procedural arrangement,

> duly adopted by the Commonwealth, is worse, or less fair, than some alternative formulation.

Id.[5]

This Court's decision in *Burdick* refusing to recognize a First Amendment right to express one's opinion through voting, as well as the courts of appeals decisions giving broad deference to states to adopt reasonable election rules, are fully supported by important state interests. At least since *Storer v. Brown*, 415 U.S. 724 (1974), this Court has recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Id.* at 730. Equally important is the state's strong interest "in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). Preventing a vote on an unconstitutional measure avoids the

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[5] Federal courts, however, are divided on whether they themselves may take the extreme step of blocking ballot initiatives approved by state law. *Compare Ranjel v. City of Lansing*, 417 F.2d 321, 325 (6th Cir. 1969) (refusing to enjoin state initiative, preferring to "allow[] the election to proceed and rule[] on the validity of the measure after its passage."), *cert. denied*, 397 U.S. 980 (1970), *and New Progressive Party v. Hernandez Colon*, 779 F. Supp. 646, 662 (D.P.R. 1991) (refusing to enjoin ballot measure where "unfairness does not rise to the level of a federal constitutional deprivation"), *with Otey v. Common Council of the City of Milwaukee*, 281 F. Supp. 264, 273 (E.D. Wis. 1968) (enjoining municipal referendum that "would significantly involve the City in private discrimination and unquestionably encourage such discrimination"); *see also Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 776 F. Supp. 1422 (D. Guam 1990) (holding unconstitutional a statute banning virtually all abortions on Guam and therefore finding the initiative authorized by the statute itself "moot"), *aff'd*, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 61 U.S.L.W. 3399 (U.S. Nov. 30, 1992) (No. 92-104).

misunderstandings that inevitably occur when unconstitutional initiatives are approved by the voters only to be rapidly enjoined by a federal or state court. Finally, removal of an unconstitutional initiative proposal from the ballot avoids wasting public funds on a useless election.[6]

The state constitutional rule that authorizes the Oklahoma Supreme Court to remove initiatives from the ballot is also an important procedural safeguard that guarantees the constitutionality of enactments proposed by initiative. In most states, laws enacted by the legislature must pass through the more cautious and deliberative legislative process: proposals receive committee study, review at public hearings, floor debate, as well as bicameral consideration by legislators, and review by the governor, all of whom have taken an oath of office to uphold the state and federal constitutions. *See* William J. Keefe & Morris S. Ogul, *The American Legislative Process: Congress and the States* (1985); Samuel Kirkpatrick, *The Legislative Process in Oklahoma* (1978). In many states, any member may request, pursuant to

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[6] For example, in *Stumpf v. Lau*, No. 23517, 1992 WL 235458 (Nev. Sept. 18, 1992), the Nevada Supreme Court found that an initiative which sought to place limits on the number of terms a United States Representative or Senator from Nevada may serve violated the qualifications clauses of Article I of the United States Constitution. Recognizing that the initiative was not designed to change the law or constitution, but merely to let the people "express themselves" in the manner of a public opinion poll on the issue, the court concluded that:

> [t]he question here cannot be implemented in a constitutional manner, and we envision no public utility in burdening an already strapped public fisc with the expense that would inevitably be incurred by placing a meaningless question on the ballot, conducting the election, and tallying the votes.

Id. at *3.

House or Senate rules, that the *entire* body vote on the constitutionality of the measure. Furthermore, legislative measures may be amended before passage, whereas ballot proposals are in their final form when submitted to the voters. In effect, pre-election judicial review serves as an important substitute for the procedural safeguards of the ordinary legislative process.[7] Contrary to petitioners' suggestion that this review fails to respect the rights of voters, timely judicial consideration of constitutional deficiencies in ballot proposals is an effective method of voter protection. By guaranteeing that initiative measures have been properly proposed and are constitutional, courts ensure that the voters' decisions are final and may be implemented.

Indeed, if petitioners possess an unlimited First Amendment right to force a vote on an unconstitutional initiative, state courts and state officials would be prohibited from regulating the initiative process in most, if not all, instances. Many state courts routinely conduct substantive pre-election judicial review.[8] Similarly, state

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[7] The procedures of the ordinary legislative process also safeguard the rights of political minorities. The Federalist No. 10 (James Madison). Pre-election judicial review is therefore also essential to prevent the diminishment of these rights through the peculiar dynamics of the initiative process.

[8] *See, e.g., Whitson v. Anchorage*, 608 P.2d 759 (Alaska 1980) (tax initiative removed from the ballot as unconstitutional under Alaska Const. art. X, § 11); *Legislature of State of Cal. v. Deukmejian*, 669 P.2d 17 (Cal. 1983) (initiative that violates state constitutional provision specifying that redistricting may occur only once within a ten year period following a federal census struck from ballot); *Hessey v. Burden*, No. 92-CV-126, 1992 WL 312830 (D.C. Oct. 27, 1992) (Superior Court may exercise its discretion to evaluate constitutional claims before an election when it is acting within its general equity jurisdiction);

(continued...)

courts, Attorneys General and Secretaries of State routinely review both ballot titles and questions and the manner in which petition signatures are collected.[9] Under petitioners' novel and unsupported theory, these routine administrative actions -- even the removal of a ballot measure for failure to obtain the required number of signatures -- would violate the First Amendment.

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[8](...continued)
Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824 (Mo. 1990) (affirmance of trial court injunction against an initiative that did not comply with the single subject requirement of the Missouri Constitution); *State ex rel. Harper v. Waltermire*, 691 P.2d 826 (Mont. 1984) (initiative ordering legislature to apply to Congress to call a federal constitutional convention to consider a federal balanced budget amendment removed from ballot on state and federal constitutional grounds); *City of Newark v. Benjamin*, 364 A.2d 563, 568 (N.J. Super. Ct. 1976) (declaratory judgment issued against initiative concerning the police review board, holding that "[i]f an ordinance is invalid on its face, it would be a useless expenditure of effort and money to submit it to the electorate before its validity had been determined"), *aff'd*, 381 A.2d 793 (N.J. 1978).

[9] Several states provide by statute for pre-election judicial review of initiative titles and petitions. *See, e.g.*, Okla. Stat. Ann. tit. 34, § 10 (West 1990); Colo. Rev. Stat. § 1-40-102(3) (Supp. 1992); Idaho Code § 34-1809 (Supp. 1992); Neb. Rev. Stat. §§ 32-706 and 32-707 (1991); Utah Code Ann. § 20-11-17 (1991); Wash. Rev. Code Ann. § 29.79.060 (West Supp. 1992); *see also Bradley v. Galloway*, 651 S.W.2d 445 (Ark. 1983) (Chancery Court has jurisdiction to review insufficient initiative petitions); *Power v. Robertson*, 93 So. 769 (Miss. 1922) (circuit court has jurisdiction to review sufficiency of initiative petitions); *In re Proposed Initiative on Parental Notification of Abortions for Minors*, 794 P.2d 238 (Colo. 1990) (directing the Title Setting Review Board to revise the title, ballot title and submission clause of an abortion initiative because they violated the Colorado Constitution).

II. INTERPRETING THE FIRST AMENDMENT TO REVOKE THE POWER OF STATE COURTS TO RULE ON THE CONSTITUTIONALITY OF INITIATIVE PETITIONS WOULD UNDERMINE PRINCIPLES OF JUDICIAL REVIEW.

Acceptance of petitioners' claim that the ruling below is a content- and viewpoint-based restriction on speech also flies in the face of fundamental principles of judicial review that have governed our nation since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

As Chief Justice Marshall asserted in *Marbury*: "It is emphatically the province and the duty of the judicial department to say what the law is." *Id.* at 177. The Chief Justice continued:

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. at 178.

State courts have the same obligation to guard and enforce the Constitution. *Robb v. Connolly*, 111 U.S. 624, 637 (1884) ("[u]pon the State courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States and the laws made in pursuance thereof, whenever those rights are involved in any suit or proceeding before them"). Although Article III

of the United States Constitution usually prevents the federal courts from reviewing the constitutionality of *proposed* legislation,[10] no similar bar exists for state courts. *Doremus v. Board of Educ.*, 342 U.S. 429, 434 (1952) (state courts not prohibited from ruling on federal constitutional issues in an advisory opinion); *see also Asarco, Inc. v. Kadish*, 490 U.S. 605, 620 (1989). In fact, as part of their duty to ensure that both the federal and state constitutions are not violated, many state courts, like the Oklahoma Supreme Court,[11] routinely review the constitutionality of initiative petitions before they are submitted to the general public for an election, *see supra* note 8, and several state constitutions specifically provide for pre-enactment judicial review of legislation or for the use of advisory opinions to obtain an early adjudication of constitutionality and avoid costly litigation on the enactment of laws that are clearly invalid.[12]

The Oklahoma Supreme Court clearly recognized its essential role as protector of the electoral process and the Constitution:

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[10] *But see Otey v. Common Council of City of Milwaukee*, 281 F. Supp. 264 (E.D. Wis. 1968).

[11] If reaching the constitutional issue may prevent a costly and unnecessary election, Oklahoma Courts routinely use pre-election judicial review. *See In re Initiative Petition No. 348*, 820 P.2d 772, 780 (Okla. 1991); *In re Initiative Petition No. 347*, 813 P.2d 1019, 1030 (Okla. 1991); *In re Initiative Petition No. 341*, 796 P.2d 267, 269 (Okla. 1990); *In re Initiative Petition No. 315*, 649 P.2d 545, 547-48 (Okla. 1982); and *In re Supreme Court Adjudication of Initiative Petitions in Norman, Oklahoma*, 534 P.2d 3, 8 (Okla. 1975).

[12] *See, e.g.*, Colo. Const. art. VI, § 3; Me. Const. art. VI, § 3; Mass. Const. pt. 2, ch. 3, art. II; N.H. Const. pt. 2, art. 74; R.I. Const. art. X, § 3; S.D. Const. art. V, § 5.

> This Court is the Protector of our Constitution. While the electorate has a constitutional right to amend the Oklahoma Constitution, it is this Court's responsibility to see that the petitions for change actually reflect the voters intent and comply with the requirements set out in both the Constitution and the statutes.

8a-9a (quoting *In re Initiative Petition No. 344*, 797 P.2d 326, 330 (Okla. 1990)). Adoption of petitioners' unsupported First Amendment theory would undermine state courts' time-honored role as the guardian and protector of constitutional principles and must therefore be rejected.

CONCLUSION

Because there is no First Amendment right to use the election process as a forum for political expression, and because acceptance by this Court of petitioners' novel and groundless claims would violate traditional principles of judicial review embraced by this Court for almost two hundred years, the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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